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Attorneys for Defendants,  
OCWEN LOAN SERVICES, LLC erroneously sued  
herein as Ocwen Financial Services

**UNITED STATES DISTRICT COURT**

**DISTRICT OF CALIFORNIA, SOUTHERN DISTRICT**

MEYKE ARENS,

Plaintiff,

v.

OCWEN FINANCIAL SERVICES,  
AZTEC FORECLOSURE  
CORPORATION, AEGIS  
MORTGAGE CORPORATION and  
DOES 1-10;

Defendants.

Case No.: 08cv796 JM (POR)

**DEFENDANT OCWEN'S NOTICE  
OF MOTION AND MOTION TO  
DISMISS PLAINTIFF'S  
COMPLAINT; MEMORANDUM  
OF POINTS AND AUTHORITIES**

**TO THE COURT, TO PLAINTIFF AND THE PARTIES AND THEIR  
COUNSEL OF RECORD:**

**PLEASE TAKE NOTICE** that on June 13, 2008 at 1:30 p.m. or as soon thereafter as may be heard, in Courtroom 16, of the above-entitled Court located at 940 Front Street, San Diego, California 92101, Defendant OCWEN LOAN SERVICING, LLC, erroneously sued herein as OCWEN FINANCIAL SERVICES (referred to as "Ocwen"), will and hereby does move this Court to dismiss, with prejudice, the Plaintiff's Complaint ("Complaint") on file herein.

This Motion is made and based upon Rules 12(b)(6) of the Federal Rules of Civil Procedure, and is based on the ground that Plaintiff has failed to state a claim upon which relief may be granted and the Complaint is barred as a matter of law

1 against Ocwen. This Motion is based upon this Notice, the attached Memorandum  
2 of Points and Authorities, and upon all papers and documents on file herein, the  
3 Court's files concerning this action, together with those facts and documents of  
4 which the parties request judicial notice and/or matters which judicial notice is  
5 proper, as well as any oral argument that may be presented at the time of the  
6 hearing.

7  
8 DATED: May 8, 2008

HOUSER & ALLISON  
A Professional Corporation

9  
10 /s/ Starlet J. Japp

11 Eric D. Houser

12 Starlet J. Japp

13 Attorneys for Defendant,

14 OCWEN LOAN SERVICING, LLC  
erroneously sued herein as OCWEN  
15 FINANCIAL SERVICES  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

#### **A. Summary of Argument**

Plaintiff borrowed \$760,800.00 from Aegis Mortgage Corporation (“Aegis”) on February 18, 2005. The loan was secured by the Property located at 11305 Forestview Lane, San Diego, California 92131 (“Property”). (A copy of the Deed of Trust is attached hereto as **Exhibit “A”**.)<sup>1</sup> Ocwen Loan Servicing, LLC (“Ocwen”) began servicing the loan in July 2007. Plaintiff defaulted on the loan while Ocwen was the loan servicer.

After defaulting on the loan, Plaintiff attempted to enter into a contract to sell the Property for an amount less than she owed Defendants on the loan. When the Defendants refused to accept the reduced price, Plaintiff filed this suit. The Plaintiff’s concerns seem to be based upon her anger that she was not allowed to sell the Property for an amount less than what she owed on the loan secured by the Deed of Trust. (*See* Cplt. ¶¶ 12, 15, 16, 26.)

The Plaintiff’s claims have been disguised with state law headings but in reality the claims fall under federal lending statutes. The statute of limitations for the federal lending statutes all expired several months prior to the filing of this action. Further, the Plaintiff’s ill-fitted state law claims are plagued by the same timing defect, as well as, other incurable deficiencies. Consequently, all of the Plaintiff’s claims against Ocwen fail as a matter of law.

The first and second claims in the Complaint do not clearly state how or why Plaintiff is entitled to relief. These claims include broad allegations of fraud and violations of the federal lending statutes. The claims are so vague that Ocwen is not put on notice as to what actions it allegedly took which equate to fraud.

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<sup>1</sup> Branch v. Tunnel, 14 F.3d 449, 454 (9th Cir. 1994) (on motion to dismiss, the court may consider documents exhibited, referred to, or that are central to the Plaintiff’s complaint); Parrino v. FHP, Inc., 146 F.3d 699, 706 (9th Cir. 1998); Cortec Industries, Inc. v. Sum Holdings, L.P., 949 F.2d 42, 47 (2nd Cir. 1991).

1 Plaintiff also fails to recognize that the statute of limitations for the federal lending  
2 laws referenced and the fraud claim expired prior to the filing of the Complaint.

3 The third claim for “cancellation of trust deed” is based upon the Plaintiff’s  
4 conclusion that Defendants wrongfully claim an interest in the Property based  
5 upon the Deed of Trust recorded at Document No. 2005-0154915. (See Cplt. ¶ 33.)  
6 However, Plaintiff centers her request on the allegation that Defendants’ allegedly  
7 acted fraudulently during the loan origination process and violated the federal  
8 lending laws. The statute of limitations for the federal lending laws and alleged  
9 fraud expired prior to when Plaintiff’s Complaint was filed.

10 The Plaintiff’s fourth claim for “Equitable Relief: Preliminary Injunction,  
11 Temporary Restraining Order, Temporary Injunction and Permanent Injunction”  
12 fails because it lists prayers for relief not claims. Further, all of these requests are  
13 redundant because they have been included in the Prayer section. (See Cplt.  
14 Prayer ¶¶ 1, 7, 8.)

15 The fifth claim for “Unfair Business Practices Act/Misleading Advertising”  
16 alleges that Defendants Aegis Mortgage Corporation (“Aegis”) and Ocwen  
17 violated *California Business and Professions Codes* §17200 and § 17500. (See  
18 Cplt. ¶ 43.) Similar to the Plaintiff’s first and third claim, the allegations included  
19 in the fifth claim are based upon violations of federal lending laws for which the  
20 statute of limitations have expired. Ocwen’s motion to dismiss should be granted  
21 in its entirety because the Plaintiff’s claims against Ocwen fail as a matter of law.

## 22 **B. Summary of Allegations**

23 Although the Plaintiff’s Complaint contains five separate claims the  
24 Complaint really contains two central assertions. The first assertion is that the  
25 terms of the loan were concealed at the time the loan was created. The second  
26 assertion is that the Defendants’ refused to allow Plaintiff to proceed with a  
27 contract to sell the Property for an amount less than what Plaintiff owes the  
28 Defendants.

1 The viability of the Plaintiff's first assertion is eliminated under two  
 2 different theories. First, the laws which are the basis for the Plaintiff's loan  
 3 origination claims all possess a three year statute of limitations which expired  
 4 several months before the Complaint was filed. Second, Ocwen was not involved  
 5 in the origination of the Plaintiff's loan and therefore was not a party to the acts  
 6 which created the loan and which are the basis of the Plaintiff's dispute.

7 The second assertion can be disposed of because the Plaintiff failed to raise  
 8 even one legal argument regarding why the Defendants' refusal to accept the  
 9 discounted amount was wrong. The Plaintiff merely infers that she is dissatisfied  
 10 with the Defendants' decision.

## 11 **ARGUMENT**

### 12 **II. PLAINTIFF CANNOT MAINTAIN HER FIRST CLAIM AGAINST** 13 **OCWEN**

#### 14 **A. Plaintiff's Contentions That Defendants' Violated TILA By** 15 **Allegedly Failing To Make Required Disclosures At Loan Origination Are** 16 **Time Barred**

17 The Plaintiff's first Claim is grounded upon alleged violations of The  
 18 Federal Truth In Lending Act ("TILA"), 15 U.S.C. §§ 1601-1666j. (*See* Cplt. ¶  
 19 6(a-f).) The Plaintiff alleges at Paragraph 6, "Disclosures required by state and  
 20 federal law for the benefit of the borrower were never made to the Plaintiff." The  
 21 "federal law" that governs loan disclosures at the time of closing is TILA. Also in  
 22 Paragraph 6, Plaintiff alleges that, "Material misrepresentation[s] of facts were  
 23 made to induce Plaintiff to borrow the stated amount...Terms material to the loan  
 24 transaction were concealed from Plaintiff...Defendants inflated commissions and  
 25 fees charged to the borrower in the...funding of the loan..." (*See* Cplt. ¶ 6.)  
 26 Interestingly, when Plaintiff refinanced the Property and obtained the Loan she not  
 27 only accepted the adjustable rate feature and the fees and costs but more than  
 28

1 \$218,000.00, a portion of which was used at closing to pay off Plaintiff's other  
2 debts.

3 The form of disclosure referred to in this Claim is governed by 15 U.S.C. §  
4 1632. TILA addresses disclosures required to be given by a lender to a borrower  
5 at the time the mortgage is obtained. A TILA action for damages must be brought  
6 within a maximum of one year and a TILA action for rescission must be brought  
7 within a maximum of three years from the loan transaction. 15 U.S.C. §§ 1635(f),  
8 1640(e); and *see, Hubbard v. Fidelity Federal Bank*, 824 F. Supp. 909 (C.D. Cal.  
9 1993). The Plaintiff's allegations focus on the loan origination which occurred  
10 during February 2004. However, the Complaint was not filed until over three  
11 years later in April 2008.<sup>2</sup> Consequently, any action for damages or for rescission  
12 is time barred because the Plaintiff's statute of limitations expired no later than  
13 February 2008, which was several months before the Complaint was filed.

14 Additionally, Plaintiff refers to the change in the interest rate but did not  
15 attach the Adjustable Rate Rider to the Complaint. Plaintiff signed the Adjustable  
16 Rate Rider which is attached hereto as **Exhibit "B."** As evidenced by the  
17 Adjustable Rate Rider, the interest rate was set to adjust in March 2007 which  
18 happened to be close to the same time Ocwen began servicing Plaintiff's loan. It  
19 is clear from Plaintiff's signature on the Adjustable Rate Rider that Plaintiff knew  
20 the interest rate was adjustable when she accepted the loan terms in exchange for  
21 \$760,800.00.

22 ///

23 ///

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26 <sup>2</sup> TILA actions for rescission or damages commence from the time of the disclosure violation, i.e. when the loan  
27 was consummated. 15 U.S.C. §§1635(f), 1640 (e); *Hubbard v. Fidelity Federal Bank*, 824 F. Supp. 909 (C.D. Cal.  
28 1993); *King v. Cal.*, 784 F.2d 910, 913 (9<sup>th</sup> Cir. 1986); *Beach v. Ocwen Federal Bank*, 523 U.S. 410, 417-419, 118  
S. Ct. 1408 (1998) (TILA limitation periods are absolute such that TILA rights expire at the end of the term, there is  
no tolling.)



**B. Plaintiff's Contention That Defendants Violated FDCPA Also Fails To Establish A Claim For Which Relief Can Be Granted**

Although it is unclear what Plaintiff is contending Ocwen did wrong, Ocwen herein responds to the Plaintiff's blanket allegations regarding the alleged violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. 1692(a)(6). Plaintiff appears to dispute the amount Ocwen said was owed on the loan. The story painted by the Complaint is that the Plaintiff entered in to a contract to sell the Property for \$830,000.00 which was less than the amount owed on the loan. It appears Plaintiff was satisfied with the sales price because she only intended to pay off the principal balance on the loan which was \$747,866.52, but Plaintiff did not intend to pay off the entire loan balance. (See Cplt. ¶¶ 12, 13, 14, 15.) When Plaintiff learned that Ocwen was unwilling to accept less than what was owed Plaintiff cancelled the contract for the sale of the Property. Approximately two weeks later Plaintiff filed this action.

Plaintiff's Complaint clearly expresses her irritation with the Defendants for attempting to collect the amount owed on the loan secured by the Property. However, the Complaint fails to specify how Defendants' intention to collect the amount owed violated any of Plaintiffs' rights.

**IV. PLAINTIFF'S FRAUD CLAIM FAILS AS A MATTER OF LAW**

Plaintiff's second claim alleges that Defendants acted fraudulently when they failed to comply with disclosure requirements during the origination of the Plaintiff's loan. Unfortunately for the Plaintiff this claim is also defective.

**A. Plaintiff's Fraud Claim Is Time Barred**

Plaintiff alleges that the Defendants committed fraud by making misrepresentations which induced the Plaintiff to enter into the loan. (See Cplt. ¶ 6.) Each allegation the Plaintiff made refers to the loan application and/or the documentation which facilitated the Plaintiff's loan. (See Cplt. ¶ 6 (a-f).) Plaintiff claims that if she had known the true terms of the loan she would not have entered

1 into it. (See Cplt. ¶ 31.) Plaintiff's claims that the Defendants misrepresented,  
2 concealed, and suppressed facts material to the transaction. (See Cplt. ¶ 29.) The  
3 loan was originated in February 2005.

4 The statute of limitations for a fraud claim is three years. *California Code*  
5 *of Civil Procedure* § 335 and 338(d). Plaintiff's claim is barred by the statute.

6 "The periods prescribed for the commencement of  
7 actions other than for the recovery of real property, are  
8 as follows: Within three years: An action for relief on  
9 the ground of fraud or mistake. The cause of action in  
10 that case is not deemed to have accrued until the  
11 discovery, by the aggrieved party, of the facts  
constituting the fraud or mistake." *Cal. Code Civ. Proc.*  
§ 335 and 338(d).

12 Plaintiff's fraud claim fails as a matter of law because she filed her  
13 Complaint in April 2008, which was over three years after the fraud allegedly  
14 happened.

15 **B. Plaintiff's Fraud Claim Fails Because It Lacks Specificity**

16 Pleading a cause of action for fraud requires specific allegations of the what,  
17 how, where, by whom, to whom, and by what means the alleged representations or  
18 concealments were made. *Stansfield v. Starkey*, 220 Cal.App.3d 59, 73 264  
19 Cal.Rptr. 337, 345 (1990). When asserting fraud against a corporation, a plaintiff  
20 must also specifically allege the names of the persons, their authority to speak, to  
21 whom they spoke, what they said or wrote, and when it was said or written.  
22 *Tarmann v. State Farm Mutual Automobile Insurance Company*, 2 Cal.App.4th  
23 153, 157, 2 Cal.Rptr.2d 861, 862-63 (1991); *Williams v. WMX Technologies, Inc.*,  
24 112 F.3d 175, 178 (5th Cir. 1997) (Rule 9 requires "the plaintiff to allege the who,  
25 what, where and when of the alleged fraud.").

26 No such specifics are provided in the Complaint. The Plaintiff's fraud claim  
27 is based upon the events which led up to the birth of this loan. Ocwen was not  
28 involved during the loan origination process. As admitted by Plaintiff's



1 Complaint, Ocwen “assumed the loan from Aegis.” (See Cplt. ¶ 4.) Further,  
2 Plaintiff does not identify who from Ocwen participated in the fraudulent acts  
3 which allegedly induced Plaintiff to enter into the loan which she now disputes.  
4 Plaintiff cannot make such allegations because Ocwen was not involved in the  
5 origination of Plaintiff’s loan.

6 The only time the Complaint specifically names alleged representatives of  
7 Ocwen is in the summary of the situation regarding Plaintiff’s recent attempt to  
8 sell the Property. The Complaint clearly identifies Plaintiff’s discontent with  
9 Ocwen’s refusal to accept an amount less than what was owed on the loan.  
10 However, Plaintiff did not include a single remark that anyone involved in the  
11 transaction acted fraudulently. (See Cplt. ¶¶12-26.) For all of the above reasons  
12 the fraud claim is deficient and Ocwen’s Motion to Dismiss the Complaint with  
13 prejudice should be granted.

#### 14 **V. PLAINTIFF’S THIRD FAILS BECAUSE IT IS TIME BARRED**

15 The third claim in the Complaint asks this Court to cancel the Deed of Trust.  
16 (See Cplt. ¶ 35.) The Plaintiff contends that she will be injured if the Deed of  
17 Trust is not cancelled. (See Cplt. ¶ 35.) The Plaintiff’s request is time barred  
18 because she is seeking to rescind the loan based upon the alleged TILA violations.  
19 As previously stated, a TILA action for rescission must be brought within a  
20 maximum of three years from the loan transaction. 15 U.S.C. §§ 1635(f), 1640(e);  
21 and see, *Hubbard. v. Fidelity Federal Bank*, 824 F. Supp. 909 (C.D. Cal. 1993).  
22 Because more than three years passed between the creation of Plaintiff’s loan and  
23 the filing of the Complaint the claim for rescission is time barred.

#### 24 **VI. PLAINTIFF’S FOURTH CLAIM FAILS AS A MATTER OF LAW**

25 The fourth claim is also misplaced. It is made up of several requests for  
26 relief which would be more appropriately found in the Prayer section of the  
27 Complaint. It does not contain any new factual allegations. This claim also  
28 includes a request for a temporary restraining order (“TRO”) and preliminary

1 injunction. The Complaint is not the appropriate pleading wherein to request this  
 2 type of relief. Further, Plaintiff has addressed this request in the TRO which is  
 3 already in place. The Plaintiff's ability to sustain the restraint of the foreclosure  
 4 sale should be addressed in a preliminary injunction hearing not in a claim  
 5 included in the Complaint.

## 6 **VII. THE FIFTH CLAIM FAILS BECAUSE IT IS VAGUE**

7 At first glance the fifth claim appears to include claims that the Defendants  
 8 violated California Bus. & Prof. Code §17200. However, the claim contains vague  
 9 allegations that, "Aegis and Ocwen engaged in unfair competition, unlawful,  
 10 unfair or fraudulent business practices, and misleading advertising in violation of  
 11 California Business and Professions Code § 17200 et seq. and Business and  
 12 Professions Code § 17500 by committing the acts and omissions hereinabove  
 13 recited, including, but not limited to the violation of the statutes regulating the  
 14 loan." (See Cplt. ¶ 43.)

15 Here, as in the fraud claim, Ocwen is not put on notice for what accusations  
 16 it must defend itself against. "A plaintiff must state with reasonable particularity  
 17 the facts supporting the statutory elements of the violation [under 17200]." *Khouri v. Maly's of California, Inc.*, 14 Cal.App.4th 612, 619, 17 Cal.Rptr.2d 708  
 18 (1993). In order for the act to be deemed "unlawful," it must be shown that it is a  
 19 "business practice and that at the same time is forbidden by law." *Id.*; *Walker v.*  
 20 *Countrywide Home Loans, Inc.*, 98 Cal.App.4th 1158, 1169-1170, 121 Cal.Rptr.2d  
 21 79 (2002). Unfair business practices under Section 17200 applies to ongoing  
 22 conduct, relief is not available to remedy past conduct. *Mangini v. Aerojet-*  
 23 *General Corp.*, 230 Cal.App.3d 1125, 1155-56 (1991).

25 Plaintiff has merely recited portions of the statutes and then alleged that the  
 26 Defendants violated them without giving any additional information. Then the  
 27 Plaintiff incorporates the alleged TILA violations included in the other portions of  
 28 the Complaint. The TILA violations were previously eliminated based upon the

1 expired statute of limitations. The remainder of this claim is so vague that Ocwen  
2 cannot form a useful response. Further, because this claim is vague it does not  
3 present grounds for the relief Plaintiff requested.

4 **VIII. CONCLUSION**

5 Plaintiff's entire Complaint focuses on loan origination issues.  
6 Accordingly, Plaintiff cannot amend the Complaint to include Ocwen in the loan  
7 origination claims because Ocwen became involved in 2007, several years after  
8 the loan and Deed of Trust were created. Based upon the foregoing, it is  
9 respectfully requested that Ocwen's Motion to Dismiss Plaintiff's entire  
10 Complaint be granted without leave to amend.

11  
12 DATED: May 8, 2008

HOUSER & ALLISON  
A Professional Corporation

13  
14  
15 /s/ Starlet J. Japp

Eric D. Houser

Starlet J. Japp

Attorneys for Defendants,

OCWEN LOAN SERVICING, LLC,  
erroneously sued herein as OCWEN  
FINANCIAL SERVICES

**PROOF OF SERVICE**

STATE OF CALIFORNIA                    )  
  ) ss.  
COUNTY OF ORANGE                    )

I am employed in the County of Orange, State of California. I am over the age of eighteen and not a party to the within action. My business address is 9970 Research Drive, Irvine, California 92618.

On May 8, 2008, I served the following document described as:


**NOTICE OF FILING NOTICE OF REMOVAL**

On the following interested parties in this action:

Don C. Burns  
LAW OFFICE OF DON C. BURNS  
71-650 Sahara Road, Suite 2  
Rancho Mirage, California 92270  
Tel: (760) 341-8212  
*Attorneys for Plaintiff*

[X] VIA FIRST CLASS MAIL—CCP §§ 1013(a); 2015.5: By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on the date following ordinary business practices. I am readily familiar with my firm's business practice and collection and processing of mail with the United States Postal Service and correspondence placed for collection and mailing would be deposited with the United States Postal Service at Irvine, California, with postage thereon fully prepaid that same day in the ordinary course of business.

I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct. Executed on May 8, 2008 at Irvine, California

  
Courtney Heishey